

**Senate Committee on Ethics reform and Government Operations
2007 January Special Session Senate Bill 1**

Testimony of Kevin J. Kennedy
Executive Director
Wisconsin State Elections Board
January 18, 2007

Chairperson Risser and Committee Members:

Thank you for the opportunity to testify on 2007 Special Session Senate Bill 1. It is an honor to appear before the Committee. Speaking as an individual who has worked in the campaign finance and election profession for almost 28 years, I support the legislation, but I have some suggestions for change that I believe will improve the legislation. I also offer a technical change to improve the utilization of the Statewide Voter Registration System (SVRS).

I believe that changes need to be made to ensure more transparency when the new Board provides advice to individuals and other entities concerning the application of campaign finance, election and lobby regulations. I also believe that the public should be able to observe the Board's discussion concerning enforcement decisions in these areas. We have that now with respect to advice and enforcement decisions involving campaign finance and election regulations. It is lost under the current draft.

I believe the administration of elections can be enhanced if the legislation establishes a separate citizen board to oversee elections. The restriction on holding or running for state or local office also raise a concern. I also request a technical change that will enable local election officials to print poll lists with voters' SVRS number. This will correct a drafting error in 2003 Wisconsin Act 265.

Loss of Transparency

This legislation was developed to provide more enforcement resources for the state's campaign finance, election, ethics and lobbying laws. The legislation makes a significant contribution to ensuring there are independent resources to enforce the campaign finance, ethics and lobbying regulations currently in place by providing a reliable source of funding for enforcement. The legislation establishes a citizen board that will engender public confidence in the enforcement of the campaign finance, ethics and lobbying laws. The legislation also establishes a practical method of collecting penalties for routine but minor violations.

This is done at significant cost. Under the legislation, there will be less public scrutiny of the dispensing of advice and decisions to enforce the campaign finance law. There will also be a reduction in the transparency of the administration of elections in Wisconsin. The legislation generates new administrative issues and ignores the expanded role election administration plays in the operations of the State Elections Board.

Currently, requests for guidance from the State Elections Board are public. The discussion on opinion requests is conducted in open session after receiving public comment. Similarly the decision to proceed with an enforcement action or to review a settlement extended by the Elections Board staff pursuant to an established schedule is made in open session of the State Elections Board.

This legislation shields the initial request for advice and the discussion of Board members from the public. Only the outcome of the Board's decision is available to the public. This is inconsistent with the fundamental principles established by the legislature in 1974 when it re-wrote the campaign finance law following the Watergate scandal. In the first sentence of its declaration of policy the Legislature states it "finds and declares that our democratic system of government can be maintained only if the electorate is informed." Section 11.001, Wis. Stats.

Providing transparency to the decision making of the new Board will ensure an informed electorate.

Improve the Administration of Elections

The objective of this legislation is to augment the enforcement resources currently available under a Board that instills public confidence in its independence and resolve. However, the legislation attaches election administration and voter registration responsibilities to the new enforcement Board. Election administration and voter registration is a partnership between state election officials, local election officials and voters.

The legislation separates the administration and enforcement of campaign finance regulations from the administration of elections and voter registration. However, the challenges and complexity of election administration and voter registration has increased exponentially in the past six years.

The legislation creates a six-member citizen Board comprised of retired judges. I do not believe that a group of part-time citizens, no matter how committed, will be able to acquire the subject matter expertise required to set policy in the areas of campaign finance, election administration, voter registration, public funding of political campaigns, standards of conduct, conflict of interest, personal financial disclosure and lobbying. The State Elections Board presently consists of nine members who serve two-year terms. The State Ethics Board currently consists of six nonpartisan members appointed by the Governor subject to confirmation by the Senate. We are reducing the number of citizens involved in oversight of these complex regulations by sixty percent. For six citizens meeting once or twice a month to grasp all the complexities of the diverse areas of regulation will require a commitment that many private citizens will not have the time to offer.

The legislation does not recognize the expanded role that election administration requires following the passage of the Help America Vote Act of 2002 (HAVA). In addition the Legislature has further expanded the responsibilities of State Elections Board and its staff through legislation enacted in the previous two sessions: 2003 Wisconsin Act 265, 2005 Wisconsin Act 92 and 2005 Wisconsin Act 451.

The Statewide Voter Registration System (SVRS) will continue to require additional staffing and financial resources to provide services to local election officials and the public. This includes the infrastructure maintenance and support costs charged by the Department of Administration, the transaction costs for data base matching with the Department of Transportation, the Department of Corrections and the Department of Health and Family Services. The agency will need technical support staff, a help desk, election specialists to work with local election officials, a training team and an administrator to oversee the area of voter registration.

In addition, the increasing complexity of voting equipment will require additional state staff to oversee vendor compliance and assist local election officials with purchasing, programming and maintenance of voting systems. The state will also have to maintain the increased level of assistance and training currently being provided to local election officials.

One approach to addressing this expanded state role is to establish a new Board of Elections consisting of voters and local election officials. I believe it is essential that the administration of elections continue to be conducted under a nonpartisan chief election official and a nonpartisan staff reporting to a citizen Board. The lessons learned from the abuses of partisan chief election officials in California, Florida and Ohio should be sufficient cause for maintaining nonpartisan control over election administration in Wisconsin.

This can be done by establishing a separate agency responsible for election administration and voter registration. This would involve recasting the current Elections Board into a new Board comprised of voters and election officials. The proposed legislation does not adequately account for the increased election administration responsibilities that are now part of the duties of the State Elections Board.

By maintaining two separate Boards there is no need to add personnel to administer the combined responsibilities of the proposed Board. The legislation utilizes a new position, the Legal Counsel, to assist the Board and make administrative decisions. This role can be carried out by the head of the Ethics and Accountability division in the role of executive director for an

agency that focuses on administration and enforcement of campaign finance, ethics and lobbying regulations. This eliminates the administrative challenges presented in combining the current operations of the two agencies.

Restriction on Holding or Running for State or Local Office

The legislation restricts employees and individuals under contract with the Board as well as Board members from holding state or local office or becoming a candidate for state or local office. The one-year restriction on becoming a candidate for state or local office raises constitutional concerns because of the breadth of the restriction. I know that this is the subject of reconsideration by the bills authors. However, the prohibition on permitting employees to hold a state or local elective office raises some practical problems for staff of the Elections Division.

During my 28 years with the State Elections Board three of my colleagues ran for and were elected to a local nonpartisan office. One co-worker served on the Deerfield School Board. A second co-worker served on the Delafield Town Board. Currently one of the State Elections Board employees serves on the Dane County Board. Having colleagues with experience in local government provided the staff with valuable insight into the impact of our administrative and policy decisions. It also enhanced the individual's professional experience, which benefited the agency tremendously in terms of professional development.

This restriction serves no public policy purpose as applied to the staff of the Elections Division. I request that this provision be modified to permit staff of the Elections Division, except the division administrator, to serve in an elective local nonpartisan office.

SVRS Administrative Change

Because this legislation has a high likelihood of passage, I request that the Legislature make a technical amendment that will facilitate the use of SVRS by local election officials. The amendment would remove the term "voter identification number" from the list of SVRS information that may only be viewed by election officials. As a result of a drafting error in the

HAVA implementation legislation this term was added to a list of information that would not appear on the poll list.

There is no public policy reason to treat the registration identification number assigned by the SEB as confidential. It serves as a data management tool within SVRS. No one, other than authorized SVRS users, can use the number for any purpose. Those individuals are required to sign a user agreement holding them accountable for protecting access to confidential information and the use of SVRS.

The SVRS number enables users to efficiently use the functionality of SVRS. The number enables election officials to update voter history, track correspondence and administer absentee voting. The number presently appears, in both numeric and barcode format, on the poll list used at the polling place. It also appears in the same format on absentee ballot labels and other correspondence labels. By permitting the number to be used on these public documents, local election officials can fully utilize the functionality of the SVRS application.

Conclusion

The proposed legislation is designed to restore public confidence in the accountability of government. In its current form the legislation meets that objective, but at a cost. It reduces transparency in the areas of campaign finance advice and enforcement as well as in election administration. It also reduces efficiency in the administration of elections. I believe the legislation can be improved with three changes:

1. Establish a separate citizen Board of Elections consisting of voters and local election officials to oversee election administration and voter registration.
2. Provide for the ability of the public to observe the discussions of the Board when providing advice and making enforcement decisions in the areas of campaign finance and lobbying.

3. Amend Section 10 at pages 19 and 20 of the legislation in proposed Section 5.05 (2m)(d) to permit staff of the Elections Division, except the division administrator, to serve in an elective local nonpartisan office.
4. Amend Section 6.36 (1)(b)1.a., Wis. Stats., to remove the SVRS number assigned to voters from the list of protected information.

Thank you for your consideration of my comments.

Respectfully submitted,

Wisconsin State Elections Board

Kevin J. Kennedy
Executive Director



STATE OF WISCONSIN *ETHICS BOARD*

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January 18, 2007

Roth Judd
Director

Members
Senate Committee on Ethics and Government Operations

**Subject: 2007 Special Session:
Senate Bill 1/Assembly Bill 1**

I support passage and the enactment of the above-referenced bills.

I invite your attention to six matters in which you may find opportunities to strengthen the bill.

- 1. Permit the Governmental Accountability Board to collaborate with other law enforcement offices in the course of investigations; authorize communications to a person's lawyer; authorize communications appropriate to an investigation.**

Current language of bill: SECTION 61, page 40, lines 10-19, creates a section titled "UNAUTHORIZED RELEASE OR RECORDS OR INVESTIGATORY INFORMATION".

Problems: [1] The current version would prevent the Government Accountability Board from partnering with district attorneys, the Attorney General, the US Attorney, Division of Criminal Investigation, the state crime lab, police departments and other law enforcement offices in the normal course of an investigation.

[2] The bill would prevent an investigator's communication with a person's lawyer.

[3] The current language would stymie investigations and thwart settlement discussions in proceedings with multiple parties because investigation or settlement of the matter might require communicating information to people who are subjects or witnesses in the proceeding.

Solution: Amend the bill to permit communications made in the normal course of an investigation or prosecution or with law enforcement authorities.

Amend the bill as follows:

1. At page 40, line 12, after "Except" insert "for communications made in the normal course of an investigation or prosecution, communications with a local, state, or federal law enforcement or prosecutorial authority, or_".
 2. At page 40, line 12, after "as" insert "otherwise".
 3. At page 40, line 13, delete "verbally".
2. **Clearly authorize the Government Accountability Board to investigate possible violations of law whenever circumstances warrant.**

Current law: Current law authorizes the Ethics Board to investigate possible violations of the laws when circumstances warrant. Section 19.49 (3) provides in part:

19.49 (3) Following the receipt of a verified complaint or upon the receipt of other information, whether or not under oath, that provides a reasonable basis for the belief that a violation of this subchapter or subch. III of ch. 13 has been committed or that an investigation of a possible violation is warranted, the board may investigate the circumstances concerning the possible violation.

Problem: The bill repeals the authorization to investigate possible violations that the board determines ought to be investigated. This is keenly important because experience demonstrates that most of the Ethics Board's investigations have stemmed, not from complaints, but from the Ethics Board's own initiative. Multiple times this initiative, without receipt of a complaint, has led to findings of the ethics code's or lobbying law's violation. In other circumstances, the governing board should have the authority to investigate a matter to clear the air when a cloud hangs over government or a governmental official. In this way the board can bolster citizens' confidence in government even in the absence of a complaint.

The bill's language uses "shall investigate" where "may investigate" would be a better choice. The bill should speak of investigating not "violations", but "possible violations". After all, an investigation's purpose is to learn if a violation did occur.

5.05 (2m) ENFORCEMENT. (a) The board shall investigate violations of laws administered by the board

Solution: Authorize the Government Accountability Board to investigate possible violations of the law whenever circumstances warrant and not make

the Board reactive to complaints which may never come or may be filed for political advantage.

Amend the bill as follows:

1. At page 13, line 24 delete "The board shall investigate violations" and substitute "Following the receipt of a verified complaint or upon the receipt of other information, whether or not under oath, that provides a reasonable basis for the belief that a violation".
2. At page 13, line 25 after "board", insert "has been committed or that an investigation of a possible violation is warranted, the board may investigate the circumstances concerning the possible violation".

So that the amended section reads, in pertinent part:

"Following the receipt of a verified complaint or upon the receipt of other information, whether or not under oath, that provides a reasonable basis for the belief that a violation of laws administered by the board has been committed or that an investigation of a possible violation is warranted, the board may investigate the circumstances concerning the possible violation and may prosecute alleged civil violations of those laws,

3. **Provide for speedy hearing on civil complaints.** (The bill delays speedy resolutions).

Current law: Currently, following the Ethics Board's adoption of a complaint alleging a violation of ethics or lobbying laws, the matter is set for hearing before a reserve judge and the hearing must commence within 30 days unless the accused petitions for a later date. [§19.51 (1) (b)]

Problem: The bill provides that hearings on civil complaints can no longer be heard under a modified administrative hearing and must be filed in a circuit court. The requirement that civil complaints be tried in the circuit courts may considerably delay justice, to the detriment of the public and accused, and may increase costs.

Historical note. Until 1991, complaints of violations of the lobbying law were tried in the circuit court. To avoid the filing of complaints in courts the Legislature changed that system by substituting the current administrative procedure before a reserve judge.

4. Promote consistency and predictability of decisions by using 6-year staggered terms to foster institutional memory and reliance on precedent.

Current language of bill: During most years, one-third of the Board's members will be in their first year of their terms. The bill calls for six members, each holding a 4-year term. In three of every four consecutive years, two terms expire; in the fourth year no term expires.

Problem: The comparatively short 4-year term (compared with the 6-year term for members of the Ethics Board) and simultaneous turnover of 2 positions during a year (instead of one, as is the case with the Ethics Board), undermines the Board's prospects for institutional memory and reliance upon precedent that the bill might otherwise promote.

Solution: Amend the bill to provide for six-year terms, one term expiring each year.

Amend the bill as follows:

1. At page 42, lines 7 and 8, remove the overstrike except from "ethics board" and after "board" insert "government accountability board".
2. At page 42, lines 8 through 13, delete the underscored material.
3. At page 82, delete the material beginning with "2" on line 11 and ending with "2011" on line 13, and substitute "one shall be appointed for a term ending May 1, 2009, one shall be appointed for a term ending May 1, 2010, one shall be appointed for a term ending May 1, 2011, one shall be appointed for a term ending May 1, 2012, one shall be appointed for a term ending May 1, 2013, and one shall be appointed for a term ending May 1, 2014".

5. Make selection of Board's chair intentional, not by chance.

Current language of bill: The bill provides for the chair of the Government Accountability Board to be selected by chance.

Problem: If selection of the chair is left to chance, the person selected may be the least able to serve for any number of reasons, including: health, travel schedule, temperament, abilities in conducting a meeting, and ease and facility in dealing with reporters and the public.

Solution: Adhere to the normal statutory procedure [§15.07 (2)]

Amend the bill as follows:

At page 43 of the bill, delete lines 3-6.

6. Composition of Government Accountability Board.

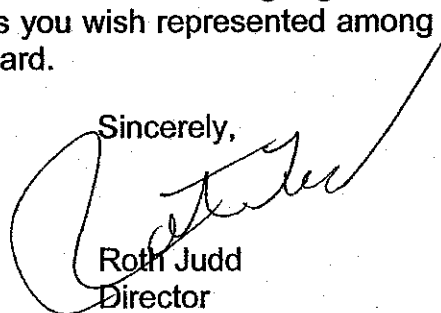
If the Supreme Court will not permit a person to accept appointment as a judge (in the judicial branch of our state's government) while a member of the Government Accountability Board (in the executive branch), then the pool from which members can be selected may be as small as 50 people, i.e., former judges who do not accept appointment to the circuit court or court of appeals as a reserve judge.

Even should the Court find that a person may simultaneously hold important posts in two branches of government, the total number of people from whom the nominating committee may select candidates is only about 120—in a state with a population of about 5,500,000.

I have attached lists of reserve judges, reserve judges authorized only to officiate at marriages, and other people who have left the office of judge since 1999. Of this latter group I lack information about which still live in Wisconsin.

Before you proceed with enactment of the bill as currently written, I ask that you satisfy yourselves that the Governor can select from this list a sufficient number of people with the statutory qualifications of nonpartisanship and freedom from lobbying connections and of the age, gender, ethnicity, experience, and other characteristics you wish represented among members of the Government Accountability Board.

Sincerely,

A handwritten signature in black ink, appearing to read "Roth Judd", is written over the typed name and title.

Roth Judd
Director

Enclosure: Lists of former judges
Copy: Ron Sklansky, Legislative Counsel

Former Judges* that do not have
reserve judge appointments

1. Jacqueline Schellinger
2. Mark Frankel
3. Allan Deehr
4. Willis Zick
5. Robert Miech
6. William Shaughnessy
7. James Wendland
8. Alan Robertson
9. Robert Curtin
10. Arlene Connors
11. Michael Torphy, Jr.
12. Warren Winton
13. James Fiedler
14. Robert Baker
15. John Mickiewicz
16. Paul Gartzke
17. Vivi Dilweg
18. Richard Stafford
19. William Donovan
20. William Callow
21. William Duffy
22. Jerold Breitenbach
23. John Danforth
24. Jon Skow
25. Earl McMahon
26. John Lussow
27. James Taylor
28. Thomas Gallagher
29. Thomas Doherty
30. Virginia Wolfe
31. Leo Schlaefel
32. John Koehn
33. Lawrence Waddick
34. Ronald Brooks
35. Roger Murphy
36. John Wagner
37. Burton Scott
38. John McGalloway, Jr.
39. Robert McGraw
40. William Reinecke
41. David Jennings, Jr.
42. Warren Grady
43. David Willis

* Judges that have left since 1999.

Reserve Judges

Marriage Only Orders

LastName	FirstName
BABLITCH	JUSTICE WILLIAM
CHARLES	HON LEWIS
CRIVELLO	FRANK
DANFORTH	HON JOHN
DAY	JUSTICE ROLAND
DUFFY	HON WILLIAM
EBERHARDT	HON HAROLD
GALSTAD	HON RICHARD
GERLACH	GARY
GESKE	HON JANINE
HEFFERNAN	HON NATHAN
HOLZ	HON MARVIN
JACKSON JR	HAROLD
JENNARO	HON WILLIAM
KUEHN	HON CHARLES
LATTON	HON HOWARD
MCCORMICK	HON JOHN
PARINS	HON ROBERT
PIES	HON S DEAN
STEINGASS	ATTY SUSAN
SULLIVAN	HON MICHAEL
WIEBUSCH	HON JOHN

NOTICE: 2003 Act 47 amended Wis. Stats. 19.36(10)(a) to provide that employers may not release records containing the home address, home e-mail, or home telephone number of employees unless an employee authorizes it. In response to this law, the reserve judge mailing list that formerly appeared here has been replaced with a list of the reserve judges' names by district.

1/02/07

RESERVE JUDGES BY DISTRICT**DISTRICT I**

Hon. Michael J. Barron
Hon. Louis J. Ceci
Hon. John F. Foley
Hon. William D. Gardner
Hon. Leah M. Lampone
Hon. Patrick J. Madden
Hon. Michael Malmstadt
Hon. Victor Manlan
Hon. Charles B. Schudson
Hon. Patrick T. Sheedy
Hon. Michael Skwierawski
Hon. Russell Stamper, Sr.
Hon. Michael P. Sullivan
Hon. Louise M. Tesmer
Hon. Lee Wells

DISTRICT II

Hon. Dennis Costello
Hon. Michael S. Fisher
Hon. Dennis Flynn
Hon. Emmanuel J. Vuvunas
Hon. Nancy Wheeler

DISTRICT III

Hon. Richard T. Becker
Hon. John Buckley
Hon. John Fiorenza
Hon. Ness Flores
Hon. Laurence C. Gram
Hon. Arnold K. Schumann
Hon. Patrick L. Snyder
Hon. Donald Steinmetz
Hon. Joseph E. Wimmer

DISTRICT IV

Hon. Henry B. Buslee
Hon. William E. Crane
Hon. Robert Haase
Hon. Fred Hazlewood
Hon. John B. Murphy
Hon. Hugh Nelson
Hon. Thomas Williams

DISTRICT V

Hon. Richard Callaway
Hon. William Eich
Hon. Daniel L. LaRocque
Hon. Gerald C. Nichol
Hon. Robert Pekowsky

DISTRICT VI

Hon. Michael W. Brennan
Hon. Dennis Conway
Hon. Raymond Gieringer
Hon. Lewis R. Murach
Hon. Duane Polivka
Hon. Richard Rehm

DISTRICT VII

Hon. Kent C. Houck
Hon. Dennis Montabon
Hon. John J. Perlich
Hon. Robert W. Radcliffe
Hon. Gary B. Schlosstein

DISTRICT VIII

Hon. James Bayorgeon
Hon. Richard G. Greenwood
Hon. Robert A. Hawley
Hon. Charles D. Heath
Hon. Larry L. Jeska
Hon. Robert W. Landry
Hon. Gordon Myse

DISTRICT IX

Hon. Robert A. Kennedy, Sr.
Hon. James Mohr
Hon. J. Michael Nolan
Hon. Earl W. Schmidt
Hon. Raymond F. Thums
Hon. Timothy L. Vocke

DISTRICT X

Hon. Thomas H. Barland
Hon. James C. Eaton
Hon. James R. Erickson
Hon. Dane Morey
Hon. Conrad A. Richards
Hon. Phillip P. Todryk



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SELECTED NEWS ITEM

THURSDAY, Jan. 18, 2007, 10:51 a.m.

By Steven Walters

Ethics Board official faults reform bill

Madison - A state administrator who investigates official misconduct today asked for major changes to an ethics-reform package that is on a fast track in the Legislature, saying its anti-leak provision is so tight it would "stymie investigations."

As the measure now reads, Ethics Board Executive Director Roth Judd said, it would be a crime for people like him to even talk with the lawyer for someone who is the target of a probe.

In a letter to members of a state Assembly committee that plans a vote on the bill next week, Judd took the measure to task for making it a new crime, punishable by up to nine months in jail and/or a \$10,000 fine, to disclose details of any pending investigation. He said that would stop investigators "from partnering with district attorneys, the attorney general, Division of Criminal Investigation and other law enforcement offices."

SEC. 61, p. 40

But see
exception
clause, 11.17-19

Last week, the state Freedom of Information Council and others also objected to the anti-leak provision, saying it would punish whistleblowers and others with knowledge about crimes or misconduct by public officials.

Judd said another potential problem with the ethics-reform package is that the new Government Accountability Board needs more authority to do its own investigations. The new panel would be created by merging the existing Ethics and Elections boards.

But see SEC. 10,
A. 13, 11.24-25
E.P. 14, 11.14-4

In its current form, Judd added, "The bill repeals the authorization to investigate possible violations that the board determines ought to be investigated. This is keenly important..."

Under the bill, crafted by Gov. Jim Doyle and legislative leaders, six former judges would serve on the new Government Accountability Board. Officials like Judd and Kevin Kennedy, executive director of the state Elections Board, would have to apply to become division heads in the new agency.

↑
line 14 by
p. 14, 11.5-6-9
?

A state Senate committee was scheduled to hold a public hearing this



210 N. Bassett St., Suite 215 / Madison, WI 53703 / 608 255-4260 / www.wisdc.org

**Wisconsin Democracy Campaign
Testimony on
January 2007 Special Session Senate Bill 1**

Senate Committee on Ethics Reform and Government Operations

January 18, 2007

Thank you for holding this public hearing today. More importantly, thank you for what you have done leading up to today to demonstrate the Legislature's commitment to working in a bipartisan fashion on much-needed ethics enforcement reform legislation.

The bill before your committee is a necessary but not fully sufficient response to a glaring and crippling shortcoming in Wisconsin's system of enforcement of ethical standards in state government. Wisconsin has a reasonably strong state ethics code in place, one that most certainly could be improved upon, but a reasonably strong one nonetheless. The problem is that these ethics rules are not worth the paper they are written on unless they are faithfully, consistently and rigorously enforced. And enforcement in recent years has left a great deal to be desired. A *great* deal.

Similarly, state law still contains the remnants of what were once some of the nation's best campaign finance laws. But these laws have been shot full of holes and now offer the public little protection from political corruption. Tragically, it's often been those responsible for enforcing our campaign finance laws who have been doing the shooting. What's worse, even what little is left of Wisconsin's campaign finance regulations is not being taken seriously by the authorities charged with enforcing them.

The state Elections Board and Ethics Board have failed the people of Wisconsin. They are no longer effective, and they need to be replaced. Because of the frequency with which the campaign finance and elections issues the Elections Board oversees intersect with the ethics and lobbying matters the Ethics Board is responsible for, it makes sense to replace them with a single enforcement authority.

Wisconsin needs a politically independent enforcement agency under the direction of a nonpartisan board. And this new enforcement authority needs real teeth.

Since receiving a copy of the draft legislation last week, we have been carefully reviewing its content. As it was initially drafted, the bill:

- Does a good job of creating a new politically independent enforcement agency under the direction of a nonpartisan board.
- Gives the new agency the authority to investigate possible wrongdoing and, most importantly, gives the new Government Accountability Board the financial means to independently conduct investigations.

However, there are other elements of the bill that need fixing. These include:

- **Prosecution authority.** While the bill equips the Government Accountability Board with reasonably strong investigatory powers, the new board is more shackled when it comes to prosecution. We believe

the new Government Accountability Board should be able to prosecute both civil and criminal cases. Just as importantly and perhaps even more so, the bill should focus on fixing what is wrong with the Elections Board and Ethics Board and should not limit or infringe upon the authority of any other law enforcement official in the state. As the *Milwaukee Journal Sentinel* editorialized Saturday, the "bill's intent should be to augment the (enforcement) tools available, not limit them."

The bill as it is written creates an overly cumbersome process that must be followed and is overly restrictive with respect to how prosecution of both civil and criminal cases must be handled. Instead of needlessly throwing hurdles in its way, the new Government Accountability Board should be given the freedom to do what the Ethics Board and Elections Board have so noticeably failed to do in recent years. Ultimately, the new agency needs to have the authority to make sure both civil and criminal prosecutions are seen through to their conclusion. As you work to craft legislation that does this, we repeat that a critically important goal of this ethics reform legislation should be to do no harm to other existing ethics enforcement tools as it seeks to repair the Elections Board and Ethics Board. In reviewing the draft legislation, this goal has not yet been met.

- **Public access to records and other public information.** Public knowledge of what is going on in government is an incredibly important component of ethics enforcement. Public awareness – or even the *possibility* of public awareness – of ethical problems is a valuable deterrent to wrongdoing. As it is written, the ethics reform bill before your committee is actually somewhat more restrictive than current law in terms of public access to records and other public information. By rights, good ethics reform should recognize the importance of public knowledge in the enforcement of an effective code of government ethics and should include measures to increase public access. But at a bare minimum, the bill should ensure at least as much access as the public and media currently enjoy. This bill currently does not pass that test.

Particularly troubling are unprecedented new penalties for leaking information, including a possible 9-month prison sentence and \$10,000 fine for violating the restrictions spelled out in the draft legislation. Government employees with knowledge of botched investigations or cover-ups or other official misdeeds should be able to act on their duty to alert the public. This bill as it is currently written would severely punish them for doing so.

- **Nonseverability.** The bill contains an unconventional nonseverability clause that would wipe out the entire new law if any portion of it were challenged in court and ultimately ruled unconstitutional. In fact, the provision appears to not only invalidate all the newly created enforcement structure and capacity, but also prevent the restoration of the pre-existing agency structure and laws replaced by the new law. This is the first time we have ever seen such an extreme nonseverability provision attached to a piece of legislation in Wisconsin. It is unnecessary and in fact is dangerously irresponsible. No good public purpose is served by this approach, and the clause should be removed. We believe any provision in the bill should be severable from the rest; in other words, if one element of the bill is struck down in court, the remaining elements should remain in effect.

All of the problems we have identified with the draft legislation are easily fixable, and there is ample time to make needed repairs to the bill before its passage and presentation to the governor for his signature. As long as legislative leaders and the governor are open to changes that make the new enforcement structure more workable and effective, there is no reason why major ethics enforcement reform cannot become reality in the next few weeks.

Thank you once again for holding this public hearing and listening to our suggestions of ways to improve this important legislation.



LEAGUE OF WOMEN VOTERS® OF WISCONSIN

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January 18, 2007

TO: Senate Committee on Ethics Reform and Government Operations
RE: Statement on January 2007 Special Session Senate Bill 1

The League of Women Voters of Wisconsin strongly supports the goal of Senate Bill 1 to create a single state agency responsible for ethics and elections and with the authority and capacity to enforce the law in these areas, including campaign finance.

The League's advocacy at the state and national levels is always grounded in our underlying commitment to promote an open governmental system which is representative, accountable and responsive. We believe government should function efficiently and economically. This requires clear assignment of responsibility, adequate financing and coordination among the different agencies of government. Beyond this, our campaign finance positions support the creation and maintenance of a strong governmental body to monitor and enforce campaign finance laws.

The proposed Senate Bill 1, which places the responsibility for ethics and elections, including campaign finance laws, under one independent Wisconsin Government Accountability Board, has the potential to accomplish the above goals.

The League has supported previous proposals to merge the Wisconsin Ethics and Election Boards and we now commend the following strengths in the current Senate Bill 1:

- The members of both the Candidate (nominating) Committee and the Government Accountability Board itself are to be completely nonpartisan, by limiting participation to appellate court and retired justices. The League would support involving representatives of nonpartisan groups. The Government Accountability Board should represent a broad and independent perspective.
- A unanimous vote of the Candidate Committee is to be required to nominate a candidate. This will reduce partisanship.
- The Government Accountability Board is to have at least six members. This brings various perspectives to the table and results in a significant quorum.
- Enforcement is rightly the core element of this proposal. Without adequate staffing and funding for enforcement along with investigating authority, the reforms of ~~Assembly~~ *Senate* Bill 1 cannot achieve the highest degree of integrity in our state government.

The League also has concerns on some of the provisions of Senate Bill 1, namely:

- The League would have preferred board members to have staggered, six-year terms. Long terms encourage institutional memory and also buffer the Board from partisan trends. In addition, we would have preferred Board decisions to require a supermajority vote.
- The League recommends the Government Accountability Board be authorized to give advisory opinions in confidence. The opinions, if binding, should be public but anonymous, satisfying the need for open records and fairness while protecting the privacy of individuals.

We hope that this committee will promptly bring to the floor a strong bill containing the above elements. It will go a long way toward restoring accountability to our state government and our democracy. Thank you very much.



PETER D. FOX
WNA Executive Director
Peter.Fox@WNAnews.com

WISCONSIN NEWSPAPER ASSOCIATION

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WNA Executive Director
PETER D. FOX

January 18, 2007

Senator Fred A. Risser
Chair, Senate Committee on Ethics Reform and Government Operations
220 South, State Capitol
PO Box 7882
Madison, WI 53707-7882

Dear Senator Risser and members of the Committee:

In the spirit of commenting to improve the proposal now before your committee, thank you for the opportunity to comment on SB-1. The Wisconsin Newspaper Association applauds the Legislature for addressing those situations which diminish public confidence in our state's political process. WNA also commends Gov. Jim Doyle for calling the current special session on ethics reform.

While appreciating the Legislature's urgency on creating ethics reform, WNA urges the Senate and Assembly to maintain a thoughtful and deliberate approach in enacting lasting public policy. WNA notes the abundant public discussion surrounding this proposal which we expect will have a beneficial influence on the final form. Now that citizens have seen the evidence of the legislative intent for reform, we urge continued detailed examination of the proposal without haste so as to prevent the "law of unintended consequences" from marring the good intentions set forth.

Without belaboring issues already identified in the public discussion, WNA wishes to note its concerns about the bill in current form. In particular, WNA believes there is no rationale for the draconian penalties up to \$10,000 and nine months jail time that could be imposed for unauthorized disclosure of Government Accountability Board information, as well as the unprecedented prohibition placed on board members and investigators from seeking public office.

WNA notes the productive discussion already is underway relating to discarding the "poison pill" provision that could usurp existing ethics oversight. Finally, WNA agrees with the succinct words of a Milwaukee Journal Sentinel editorial: "The bill 'modifies' the state attorney general's ability to prosecute offenses under the state's ethics, elections and lobbying laws. The bill's intent should be to augment the tools available, not limit them."

Sincerely,

Peter D. Fox
Executive Director



Wisconsin Freedom of Information Council

DEVOTED TO PROTECTING WISCONSIN'S TRADITION OF OPEN GOVERNMENT

Sen. State Fred Risser, Chairman
Senate Ethics Reform and Government Operations Committee
State Capitol
220 South, P.O. Box 7882
Madison, WI 53707

January 18, 2007

Dear Sen. Risser and members of the committee,

The Wisconsin Freedom of Information Council wishes to express its concern regarding a provision in the current draft of Special Session Senate Bill 1, to create a new Government Accountability Board. We feel the provision is likely to create many more problems than it solves – if indeed it solves any problems at all.

We are a statewide group devoted to protecting Wisconsin's traditions of open government. Our group is made up of public members like myself and representatives of various organizations, including the Wisconsin Associated Press, Wisconsin Broadcasters Association, Wisconsin Newspaper Association, Wisconsin News Photographers and the state chapter of the Society for Professional Journalists.

The provision of concern is in the section entitled "Records and Information." It specifically exempts from public access records prepared and obtained by the Government Accountability Board, unless the subject of an investigation directs this. And it provides criminal penalties – up to nine months in jail and a \$10,000 fine, or both – for any "investigator, prosecutor, employee of an investigator or prosecutor, or any member or employee of the board who verbally discloses information related to an investigation or prosecution" conducted by the board "prior to presentation of the information or record in a court of law."

We question, first, whether there is any need for this provision, which appears unprecedented in state statutes. What problem exactly is this

provision trying to solve? What improper communications have been made in the past by employees or members of the state Elections and Ethics Board that rise to such a level of seriousness as to merit the imposition of criminal penalties for employees and members of this new board?

More to the point, why should an agency charged with restoring public trust in the integrity of Wisconsin government officials embrace a much greater degree of official secrecy than any other state agency?

We also note the provision's lack of clarity. Elsewhere in this same section, it is stated that records containing a finding that a complaint does not raise a reasonable suspicion that a violation of law has occurred or records containing a finding that no probable cause exists are open to public access.


What if some board members strongly feel that a violation of law has occurred and/or the board launches an investigation that does not lead to formal charges being presented in a court of law? Does the state really want to make it a crime for those board members or anyone else involved in this process to ever talk about this investigation?

And what about situations in which communication regarding an investigation is clearly in the public interest? Say bloggers or other rumor mongers create a public impression that a given public official is being investigated for much more serious charges than is actually the case. Does the state really want to make it a crime for anyone associated with the board to verbally dispel these false rumors?

Finally, we are concerned about the precedent. If the agency whose job it is to protect Wisconsin's tradition of accountability is allowed to operate under such an astonishing degree of official secrecy, what other agencies will also be wanting to attach criminal penalties to the release of information about their functions?

In short, we believe this provision is deeply misguided and threatens to undercut other aspects of this important bill, and we urge this committee and the Legislature to reconsider.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Lueders", written in a cursive style.

Bill Lueders
President

January 18, 2007

TO: Senate Committee on Ethics Reform and Government Operations
FROM: Gail Shea
RE: January 2007 Special Session Senate Bill 1

This bill has many good features but it has many problems as well. I want to focus on two problems and urge the committee to amend the bill to solve them.

First, the secrecy surrounding the opinions of the Ethics Board is being applied to campaigns and elections. When a public official asks for advice about personal financial dealings, then some privacy can be afforded to that advice. When a candidate, political party or PAC asks for advice about the conduct of campaigns and the raising and spending of campaign money, that question deserves no such privacy. Campaigns and campaign money are issues of great public interest, and all discussions and opinions given by the Government Accountability Board on them should be in open meetings available for all to comment on and review.

Second, I believe that the administrative structure outlined in this bill is ill-equipped to efficiently manage the responsibilities of the Board. This is an opportunity to develop a structure that will operate effectively for years to come. I believe the agency should have three divisions: Ethics; Campaign Finance and Lobbying; and Elections. Combining campaign finance and lobbying makes sense because both are concerned with the broad issues of the use of money to influence public officials. Ethics deals primarily with the personal financial disclosures of public officials. Also, there should be a strong Executive Director empowered to oversee and coordinate the work of the three divisions.

Without a strong overall agency director, the economies of scale, budget request coordination, and efficient distribution of resources will be difficult to achieve. The independent divisions described in the bill are more like separate agencies, each going its own way.

The restrictions on public access to Board meetings and opinions should be limited to actions under subch. III of ch. 19.

The Government Accountability Board should be composed of three divisions: Ethics; Campaign Finance and Lobbying; and Elections, with a strong overall Executive Director.

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[illegible]

Fair Elections Wisconsin

January 17, 2007

Dear Members of the Senate Committee on Ethics Reform and Government Operations:

The emphasis of SB-1 is clearly on ethics, investigation, and prosecution. You have a strong public oversight board proposed, retired judges, who will be eminently qualified for this field. But what about election administration? Will they have any particular qualifications or interest to oversee election administration? Issues arise such as the statewide voter registration system, voting machine approval, audits of vote counts, and rules promulgation for observers, deputy registrars, and security of voting equipment.

A public oversight body should have the expertise to support staff when appropriate, and to have credentials and credibility so their decisions are widely supported. But they should also be able to challenge staff when appropriate. They should be able to bring recognized experience and interest in the field they are overseeing. You would not pick people for the job of overseeing ethics who did not have expertise.

There currently exists in the statutes and Election Administration council. But it is a very weak body with a limited role. Fair Elections Wisconsin is proposing to redefine this existing body, the Election Administration Council, which is mentioned in SB-1, on page 45, line 11.

We offer the included amendment to increase their role, while still working under the jurisdiction of the new Government Accountability Board. The amendment includes having the Government Accountability Board pick one of their members to be chair of the Election Administration Council. Other members would be confirmed by the full Government Accountability Board. Nominees for the revised Election Administration Council would have expertise in areas such as computer science, audits, quality control, training, and include two county or municipal clerks. They would sift and refine election administration issues and present conclusions to the Government Accountability Board for confirmation.

Election administration has a major and growing role in achieving proper elections. There have been recent law changes on the federal and state level, and controversies around the country. This trend is likely to continue. Citizens expectations of elections are increasing.

In summary, this amendment does not upset the delicate balance in this bill. It will improve election administration, and also relieve the workload on the retired judges who on the Board. Currently there is nearly universal criticism over decisions based upon partisan bias. Let's not replace this with policy decisions on election administration that are flawed due to lack of expertise.

On Behalf of Fair Elections Wisconsin,

Paul Malischke
4825 Bayfield Terrace
Madison 53705

malischke@yahoo.com
608-238-8976

Fair Elections Wisconsin is an independent all-volunteer organization working for elections that are accurate, well administered, and transparent.

Amendment Proposed by Fair Elections Wisconsin to improve the existing Election Administration Council. This amendment strengthens the Council and makes it an effective oversight committee for election administration, under the Government Accountability Board.

Changes to existing statutes:

15.617 (1)

(1) Election Administration Council. There is created in the elections Government Accountability board an eElection Administration Council. The Government Accountability Board shall choose one of their members to serve as Chair of the Election Administration Council. The administrator of the elections division shall solicit candidates to be members of the Election Administration Council and report all eligible candidates to the Chair. Members must be eligible electors, not holding or running for elective office, and not an employee or other principal of a vendor for voting machines or other election-related product. Members shall not have worked for any of these vendors for one year before becoming a member and shall not work for these vendors for one year after ceasing to be a member. The administrator shall seek candidates among the following: consisting of members appointed by the executive director of the elections board, including the a clerk or executive director of the board of election commissioners of the 2 counties or municipalities in this state having the a largest population, one or more election officials of other counties or municipalities, representatives of organizations that advocate for the interests of individuals with disabilities and organizations that advocate for the interests of the voting public, and candidates with interest or expertise in computer science and security, statistics, auditing, quality control, education and training, and voting machine technology other electors of this state.

The Chair of the Election Administration Council shall recommend nominees to the Government Accountability Board, with a report listing all interested candidates. The consent of the Government Accountability Board is required to confirm a nominee. The Election Administration Council shall consist of 9 members including the Chair, plus the non-voting election administrator. Four of the initial members shall be appointed for one-year terms, and all other members for two-year terms. There shall be a maximum of two clerks on the Election Administration Council.

5.68(3m)

3m) The election administration council shall make recommendations for optimum election administration and shall provide guidance to local units of government concerning the procurement of election apparatus, ballots, ballot forms, materials, and supplies for use in elections in this state to help ensure that competitive prices are obtained by those units of government. The Election Administration Council shall consider applications for voting machine approval, rules and topics involving audits of vote counts, pollworker and clerk training, statewide voter registration system, election observers, deputy registrars, security of voting machines, emergency preparedness, and other matters referred to them by the administrator of the elections division and the Government Accountability Board

The Election Administration Council shall forward recommendations to the Government Accountability Board and the elections division administrator. Meetings of the Election Administration Council should be broadcast and on the internet via Wisconsin Eye when possible. If circumstances prevent this, the agenda and minutes shall list the cause.

Contact for Fair Elections Wisconsin is Paul Malischke, malischke@yahoo.com, 608-238-8976

**Statement of Brian Blanchard, Dane County District Attorney,
to the Senate Committee On Campaign Finance Reform and Ethics (1/18/07)
Regarding Assembly / Special Session Bill 1**

Thank you for the opportunity to speak to your committee this afternoon regarding aspects of the current draft of Assembly / Special Session Bill 1.

I urge you to address what I believe are fundamental, and possibly constitutionally fatal, weaknesses in the current version of this proposed legislation. If passed in its current form, this bill would have the effect of weakening, not strengthening, efforts to deter and detect misconduct by state public officials in important ways.

There are several features of the current bill that I agree should be part of any serious reform attempt. For example, overhaul of a State Elections Board that currently seems driven primarily by narrow partisan considerations, not by the general public interest, is long overdue. In addition, relying on the integrity and experience of retired state court judges for some manner of oversight is an excellent idea. Finally, using a "sum sufficient" funding mechanism for investigative costs of the Government Accountability Board would be an improvement over the current Ethics Board constraint of having to use "sum certain" appropriations.

My strong objections to the current bill, however, fall into three areas:

I. WEAKENING ATTORNEY GENERAL AND DISTRICT ATTORNEY AUTHORITY AS PART OF "ETHICS REFORM"

Assembly / Special Session Bill 1 reduces current powers of the Attorney General and district attorneys in policing allegations of misconduct in public office. A real reform bill would seek to supplement and increase those powers, not complicate and reduce them, as it does in at least four respects.

A. Unprecedented And Unworkable Venue Provision

One large step backwards would be through an unprecedented, unworkable, and possibly unconstitutional reversal of fundamental legal principles regarding the definition of "venue" for an offense, which is a building block of our criminal justice systems. Venue is the place where a trial is held and where court jurisdiction may be exercised. The universal default rule in the United States for venue is simple. Cases are tried where acts related to the crime were committed, unless there is a concrete showing that pretrial publicity, significant

inconvenience, or local bias would make that unfair.¹ This rule is built into both the federal² and state constitutions.³ A defendant has a right to be tried in the place where he or she allegedly committed the crime; the constitutional requirement of criminal venue is a vital piece of a prosecution.

The rationale behind this venerable rule is clear. The county or district in which the offense occurred is where witnesses and evidence are most likely to be found, where resources to investigate the offense should be located, and where regulatory and enforcement officials who might be tempted to look the other way can be held accountable by the public for their actions or inactions.

In an amendment to Chapter 978, which defines the fundamental duties of Wisconsin district attorneys, and amendments to other provisions of the Wisconsin Statutes, the proposed legislation would limit the prosecution of criminal public corruption cases to the respective district attorney in the county of residence of each person charged.⁴ This amendment transforms a simple 19-word provision (“Except as otherwise provided by law, prosecute all criminal actions before any court within his or her prosecutorial unit”) into a 192-word loophole.

¹ See 4 LaFave, et al., *Criminal Procedure* §16.1(c) (2d ed. 1999) (“crime-committed” formula is “standard formula for setting venue” and surveying states’ standards). In Wisconsin, as in other jurisdictions, the legislature has the power to define where elements of the crime “occurred”; in other words, what specific actions related to the alleged crime need to have occurred in a geographic location to create venue there.

² See U.S. Const., Art. III, sec. 2, cl. 3 and the Sixth Amendment. See also 18 U.S.C. §3237 and Federal Rule of Criminal Procedure 18, which modifies the directives of the Sixth Amendment.

³ The state constitution provides in relevant part:

“Rights of accused. Section 7. In all criminal prosecutions the accused shall enjoy the right . . . to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.”

Wis. Const., Art. I, sec. 7.

⁴ See Section 199, amendment to Sec. 978.05(1), and Section 10, creation of Sec. 5.05(2m). Prosecution is limited in all cases arising from violations of the Code of Ethics for Public Officials and Employees (Subchapter III, Chapter 19), “and from violations of other laws arising from or in relation to the official functions” of any state official, “or any matter that involves elections, ethics, or lobbying regulation” under 10 separate chapters of the Wisconsin Statutes.

This proposed major revision of the definition of “venue” solely for public corruption cases is not called for by any legitimate rationale. Further, it would create a perfect feast for defense lawyers every time any prosecutor attempted to apply the law, resulting in many years of needless, protracted litigation. One example, which is entirely fictional but consists of typical elements of public corruption cases, may help illustrate the problems.

FICTIONAL HYPOTHETICAL

A former employee of a Sheboygan County-based corporation reports that two years ago, the CEO of the corporation made a series of illegal campaign contributions to the then incumbent chair of a legislative committee from Crawford County. The legislator has since left office and now lives in LaCrosse County. The CEO now lives and works in Milwaukee. The allegedly illegal contributions to the campaign, which was operated out of Crawford County, were arranged by a long-time legislative aide of the former legislator, who then lived in Dane County, but now lives in California. Meetings between the aide, the legislator and the CEO at which the contributions were discussed and arranged occurred in the Capitol (Dane County) and at the CEO’s former home in Sheboygan County.

The CEO, the former legislator and the legislative aide have potential criminal liability for crimes ranging from ethics and election law violations to bribery. If charged, the aide, the CEO, and the legislator should be tried together.

CURRENT LAW

Under current law, the Crawford, Dane, and Sheboygan County DA's offices might each have the option to pursue these allegations, depending on the details of facts shown by investigation.⁵ It might turn out that there is a single, solid state criminal case to be filed against some of the persons described above, and that it should be filed in one of those counties, or perhaps in some other county depending on where the evidence leads.⁶ In any case, venue could be established in any Wisconsin county through proof that an act constituting an element of a crime occurred in that county.

No DA would need permission from the Ethics Board, the Elections Board, or any court merely to investigate the allegations. Similarly, no DA would need permission from any other agency to file charges that he or she believed were merited under the law, just as no other agency can prevent a DA from charging someone with Homicide, Child Abuse, or Theft By Fraud.⁷

⁵ See Wis. Stat. Sec. 971.19 ("Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided"). Each of the elaborations on the "where the crime was committed" rule in Sec. 971.19 involves the location of the victim of a crime that is necessarily intertwined with the commission of the crime itself. For example, in the case of Child Interference (Sec. 971.19(8)), the very nature of the crime is to remove the child from his or her place of residence. There is no such nexus in public corruption cases.

⁶ See Sec. 971.19(2), stats., providing that where a crime is defined to have two or more elements that are actions, trial can be held in any county where such actions occurred.

⁷ While no permission is needed to file charges, it is important to bear in mind that in order to secure convictions on any charges, any DA would need to make a clear set of charges in a publicly filed complaint, prevail at a public Preliminary Hearing before a circuit court to bind the case over for trial, disclose all evidence to the defense, and then prove the case beyond a reasonable doubt and unanimously to twelve neutral jurors, after surviving any motions to dismiss based on alleged legal defects in the charges. Even after all that, any convicted defendant would have a right to appeal after trial.

PROPOSED LAW

There are more questions than ready answers as to how venue in this hypothetical case could be handled under the proposed law, but the following seem to be clear:

1. The only DA with venue to pursue a case against the former legislator (in LaCrosse County) is located in the only county referenced above where there appears to be no relevant evidence, witnesses, or local nexus to the case, and similarly the only DA with venue to pursue a case against the CEO would be in Milwaukee, again where there is no nexus to the alleged offenses.
2. At the same time, the LaCrosse County and Milwaukee County DA offices would each be precluded from charging the legislative aide, or from charging the other defendant not then living in their respective counties.
3. The former legislator and the CEO would appear to have constitutional challenges to prosecution in LaCrosse County or Milwaukee County -- because a defendant has a constitutional right to be tried in "the county or district wherein the offense shall have been committed" -- and perhaps even a challenge to prosecution in *any* county at all, given the confusion created by the unique venue provision now proposed.
4. Criminal defense attorneys would have little problem picking apart any single criminal complaint that alleges a series of violations by various potential defendants referred to above that is filed by *any* district attorney in *any* county. This would be effective immunity from prosecution.

All three participants in the criminal enterprise should be tried together, as would be the case for participants in any criminal conduct. This is a basic rule of criminal law for a variety of reasons of public policy, not the least important of which is that it promotes economy of judicial resources, and avoids inconsistent results. Under the proposed venue provisions, however, all of the three participants in this unlawful contribution scheme would be tried separately.

Related crimes generally occur in multiple places with at least partial knowledge of, and potential assistance from, more than one person and must be triable in one place. The universally used venue rule provides certainty and efficiency, while preventing defendants from reaping advantage from technicalities.

The proposed bill does not appear to contemplate the *ordinary* public corruption case, which typically involves multiple potential targets and multiple subjects with relevant information. Corruption cases in which there is a single suspect with potential exposure to criminal liability from beginning to end, which is apparently all this bill contemplates, are the exception rather than the rule.

Another significant problem is that the bill does not even attempt to define how it is determined where a criminal defendant “resides.” Is it where s/he lived at the time of offense or at the time the charges are filed? Does that mean a target can subvert an investigation simply by moving out of the county in which the bulk of investigation has been completed, but before charges are filed? Residency is a concept that is a frequent subject of intense litigation in many areas of the law. Introducing it in this context invites legal battles. Taxing authorities, for example, devote resources to the investigation of where a person “resides.” In contrast, where a crime occurred is generally not subject to dispute and can be readily ascertained.

The attempt here to *limit* venue would create an entirely new form of immunity that would protect only one type of potential criminal defendant: State public officials who allegedly abused their positions. Instead of limiting venue, there are good reasons to consider *expanding* venue definitions to account for criminal conduct that can otherwise prove elusive to prosecutors or to give concurrent venue to multiple potential prosecuting agencies (such as overlapping federal and state criminal jurisdictions).⁸ *More*, not *fewer*, district attorneys should have venue to charge and try cases of this type when there are relevant acts in multiple counties.

⁸ One analogy would be Wisconsin’s Misappropriation of Identity statute, Sec. 943.201, stats., for which venue was recently enlarged to recognize the loopholes that are created for identity thieves who operate across county and state lines.

I have great respect for the integrity and judgment of elected district attorneys and their staffs across the state. Creating *exclusive* venue for public corruption cases against each defendant in only one county, namely the one where a particular defendant resides, limits the options of DA offices across the state to handle these cases promptly and fairly.

B. An Underfunded GAB That Uses Overly Complex Procedural Machinations Reduces The Chances That The Attorney General Or District Attorneys Would Be Referred Any Cases Of Merit.

The new Government Accountability Board (GAB) would lack the investigative resources of even the smallest police departments in the state. There is not even a part-time investigator. There is merely an administrator of the Ethics and Accountability division of the GAB, who would be prohibited from spending more than \$10,000 to finance the cost of an initial investigation before having to create a report justifying any further expense. “Special investigators,” who are presumably not government employees, would only then gear up to look into the matter as their schedules allowed. Even then, however, this “special investigator” would not be free to issue any subpoena unless it were approved at a meeting by the GAB. Moreover, the “special investigator” would be required to write monthly reports to the GAB. These weaknesses are particularly important when it comes to Attorney General authority, since it appears that the only way for the Attorney General’s office to seek charges would be upon referral from the GAB.

C. Unique Nullification Of Special Prosecutor Statute

One critical feature of Wisconsin criminal law that is frequently relied upon by district attorneys across the state is the ability to refer certain cases and matters to fellow district attorneys or other attorneys when there is a real or apparent conflict for the first district attorney, or workload or other pressures are so acute that the first district attorney simply cannot attend to the matter. *See* Sec. 978.045, stats. In a highly unusual provision,⁹ the GAB is without authority as soon as any district attorney invokes the assistance of a special prosecutor. It is hard to see a legitimate rationale for this unique interference with long established district attorney authority.

⁹ Section 10, creating 5.05(2m), 17.

D. Attorney General Essentially Without Authority Over Corruption Cases

The only authority of the Attorney General to prosecute violations of public corruption would be upon referral by the GAB after two district attorneys have declined or failed to act, or in criminal cases involving a district attorney, circuit court judge, or a candidate for one of these offices. Again, how is it “reform” to *limit* the power of the Attorney General in this area?

II. SEVERABILITY

It is puzzling that the bill would be enacted with the ticking bomb of a nonseverability provision, particularly given the novelty of many of the provisions in the bill. No legitimate reason exists to set up a new regulatory process for failure in this manner.

III. PENALTY FOR DISCLOSURE OF INFORMATION

The proposed creation of a Class A Misdemeanor level offense for the release in any mode of any quantity or type of “information related to an investigation,” without requiring an element of malice or obstruction, is draconian and not consistent with other criminal law provisions. The *intentional* obstruction of a sworn law enforcement officer is a Class A Misdemeanor.¹⁰ Moreover, this provision makes no allowance for a fact familiar to anyone who has ever been involved in an investigation of any significant scope: It is often necessary to ask person A if what person B has said is true or false. It is not only routine, but also essential, for investigators to refer to “information related to an investigation” when communicating with various witnesses and entities as part of a professionally conducted investigation.

¹⁰ See Sec. 946.41, stats., Obstruction. See also Sec. 946.65, stats., which criminalizes “for a consideration,” that is in exchange for compensation, “knowingly giv[ing] false information to any officer of any court with intent to influence the officer in performance of official functions,” which contains several significant elements beyond merely providing false information. See also Sec. 946.66, stats., which makes it only a Class A Forfeiture for someone knowingly to make a false complaint regarding the conduct of a law enforcement officer. In comparison to these statutes, the admission of disclosure provision here is too general and too harsh.

* * * *

In sum, positive steps are possible. But the State Elections Board could be replaced, and investigations of allegations of rule violations and misconduct by state officials could be decently funded, without erecting a series of barriers to effective prosecution of public corruption cases. I respectfully ask members of the Legislature and the Governor to support additional tools, not fewer tools, to prevent and detect violations of the law. Why compromise on ethics? Thank you.



Common Cause In Wisconsin

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Testimony of Jay Heck, Executive Director of Common Cause in Wisconsin
2007 Special Session Bill 1 – Ethics and Elections Boards Reform
January 18, 2007
Senate Ethics Committee on Ethics Reform and Government Operations

Senator Risser, Senator Ellis and Members of the Committee:

We are pleased that ethics and honest, accountable government have finally emerged as top priorities for the Wisconsin Legislature and for the Governor. It is significant and gratifying that the new legislative leadership and the Governor have finally reached bipartisan agreement in making the reform of the current State Ethics and State Elections Boards the first order of business of Wisconsin State Government in 2007.

This measure was intended to combine and strengthen the currently ineffective State Elections and State Ethics Boards by merging the two state agencies into a single Government Accountability Board with enhanced powers to enforce our ethics, campaign finance, lobbying and elections laws, with sufficient funding, independent of legislative authorization, and with a non-partisan board that will hopefully act in the interests of Wisconsin's citizens rather than in support of partisan political interests.

The measure is based on one first proposed and written by Senator Ellis with input from and Common Cause in Wisconsin and others back in late 2002, in the wake of the Legislative Caucus Scandal criminal charges that had just been filed against the top legislative leaders at the time. Better late than never that this finally has the attention of the Governor and the leadership of both legislative chambers.

We believe that this draft legislation contains many important and significant improvements over current law with regard to the ability of the State Ethics and Elections Boards to effectively enforce current law and to investigate and prosecute corruption and wrong doing in state government. But it also takes a step backwards in a couple of areas and raises some questions about whether or not this measure could survive court scrutiny and avoid being struck down as being unconstitutional in its current form.

It is certainly a relief to see in newspaper articles during the last week that Rep. Mark Gundrum, Rep. Mark Pocan and others who played a key role in drafting this compromise measure have said they will fix, or remove altogether, provisions that could possibly render this entire measure unconstitutional.

Particularly troubling is the provision that appears to stipulate that if any part of the entire measure is found to be unconstitutional, the entire measure is rendered null and void and that even current laws governing the State Ethics and Elections Board are also abolished

effectively leaving Wisconsin with no state agency to administer or enforce current state ethics, lobbying, campaign finance and election laws. It appears that this could plunge Wisconsin into anarchy with respect to ethics, elections, lobbying and campaign finance laws because there would be nothing to enforce any of them.

Rep. Gundrum has said, in press accounts, that he and others will find a way to retain the current Ethics and Elections Boards if the new Government Accountability Board is thrown out by the courts. Better yet would be to make sure this legislation is crafted in such a way that it will survive court scrutiny.

While we understand the delicate balance contained in the draft legislation, we still question tying the entire measure together with a non-severable clause. Instead there ought to be limited severability stipulating that only those provisions that do not survive court challenge be excised from the legislation, leaving the other provisions to stand. Again, the better option would be to ensure that the measure survives any court challenge from the outset.

Apart from the constitutionality of the measure, there are other questions about the draft legislation.

Currently, the State Ethics Board conducts much of its business confidentially, out of the public eye, while the State Elections Board makes, by law, most of its opinions public. This draft measure appears to make all opinions issued by the new Government Accountability Board closed to public inspection (with some exceptions), thereby veiling the deliberations and actions of this new entity in even more secrecy than is currently the case. Why is that necessary? It certainly is not desirable.

The draft measure also stipulates that the new Government Accountability Board is prohibited from expending more than \$10,000 to finance the cost of an investigation before receiving a report on the progress of the investigation and recommendation to recommit additional resources. That figure seems too low. What kind of credible investigation can be mounted for under \$10,000? It would be better to have a much higher ceiling to enable an effective investigation to, at least, make some initial headway.

The draft measure stipulates that the Department of Justice cannot prosecute violations of the elections, ethics and lobbying laws unless the Government Accountability Board authorizes it to do so -- and only after two district attorneys have declined or failed to act in criminal cases except for cases involving a district attorney, circuit judge or a candidate for either of those offices. Currently, there are no such restrictions on the ability of DOJ to prosecute. What is the rationale for diminishing rather than enhancing the prosecutorial ability of the Attorney General's office over current law? Aren't we trying to enhance the ability to ferret out and deter corruption, not lessen it?

In most aspects, the draft reform legislation is a vast improvement over current law in creating a truly non-partisan, independent board composed of retired judges and selected from nominations made by appellate judges. The other vast improvement is funding

mechanism for the Government Accountability Board. Funding will be "sum sufficient" and not require legislative approval which has crippled the current Ethics and Elections Boards from having the independence they require to be effective state government guardians of the public trust

Overall, we are encouraged and are supportive of the efforts of the Legislature and Governor in getting us to this point. But we need to get all of this right the first time. We support the basic concept of this reform measure but we hope this committee will address our concerns and those raised by others before its consideration by the full State Senate in order to ensure that this does what needs to be done to restore citizen confidence in Wisconsin's one proud, honest and accountable state government.

Thank you.

